IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1159 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAIKH ABDUL RASHID

Versus

PRADHYUMANKUMAR KISHANDAS GARG

Appearance:

1. First Appeal No. 1159 of 1988

MR RAJNI H MEHTA for Petitioner No. 1-2

MR RR MARSHALL for Respondent No. 1

DELETED for Respondent No. 2

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE M.S.SHAH

Date of decision: 01/05/2003

CAV JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal under Section 110-D of the Motor Vehicles Act, 1939 is directed against the judgment and order dated 18.12.1987 rendered by the Motor Accident Claims Tribunal (Main), Surat in MACP No. 412 of 1983 awarding original claimant, respondent No. 1 herein, a sum of Rs.1,25,000/- with costs and interest at the rate of 9% p.a. from the date of the application till realization from all the original opponents including appellant Nos. 1 and 2 herein who are the owner and insurer of the truck bearing No. MHG 2705 which was involved in the accident in question which took place on 10.3.1983 and in which respondent No. 1 herein, original claimant, sustained injuries.

2. Respondent No. 1 was riding his scooter No. GAG 7796 for going to the place of his business situated near Zampa Bazar area in the city of Surat on 10.3.1983. At about 2.30 PM the above numbered truck came down on its wrong side on the scooter in excessive speed and knocked down respondent No. 1. Resultantly, respondent No. 1 suffered fracture on the lower end of left femur and other miscellaneous injuries. Respondent No.1 filed a claim petition originally claiming Rs.2,00,000/-, but subsequently reduced the claim to Rs.1,35,000/-. After considering the evidence on record, the Tribunal held that respondent No. 1 was injured by the rash and negligent driving of original opponent No. 1-driver of the truck and that there was no negligence on the part of respondent No. 1-scooterist (original claimant). On the question of compensation, the Tribunal awarded the following amounts:-

Rs. 45,000/-	Loss of past income for a period of 15 months at the rate of Rs.3,000/- per month.
Rs. 11,000/-	Expenses for medical treatment
Rs. 2,000/-	Compensation for damage to the scooter.
Rs. 11,000/-	for pain, shock and suffering
Rs. 2,000/-	for future operation.
Rs. 54,000/-	Compensation for loss of future earning capacity i.e. towards permanent partial disablement.

Rs.1,25,000/-	Total

==========

The Tribunal passed the award against all the three opponents i.e. against the driver, owner and insurer of the truck. The present appeal has been filed by the owner and insurer of the truck. The driver was also one of the appellants i.e. original appellant No. 1 who later on came to be transposed as respondent No. 2. The appeal is confined to compensation to the extent of Rs.50,000/i.e. the appellants have contended that the original claimant, respondent No. 1 herein, ought not to have been awarded more than Rs.75,000/-. In this view of the matter, there is no challenge to the finding of negligence given by the Tribunal and the submissions on behalf of the appellants are accordingly confined to the quantum in excess of Rs.75,000/-.

3. At the hearing of this appeal, Mr RH Mehta with Mr AR Mehta, learned counsel have submitted on behalf of the appellants that the Tribunal has erred in awarding Rs.45,000/- for the loss of past income for as many as 15 months when the claimant had suffered only the fracture on the lower end of the left femur and other miscellaneous injuries and, therefore, even though the claimant had to undergo surgery for bone grafting, the claimant could not have been awarded compensation for loss of income for as many as 15 months and that such compensation should not have been awarded for more than six months.

Secondly, it is submitted that looking to the medical evidence, the claimant suffered permanent partial disability to the extent of only 7% of the left lower limb and, therefore, as per the principles in Kessler, the overall functional disability of the claimant was only 3.5%. Hence, the Tribunal has awarded excessive compensation under the head of loss of future earning capacity also. It is submitted that the claimant continued to do business as before and, therefore, no compensation should have been awarded under this head.

4. On the other hand, Mr RR Marshal, learned counsel for the original claimant, respondent No. 1 herein, has vehemently opposed the appeal and submitted that the claimant had undergone surgery and prolonged treatment and that the claimant's case that he could resume work after 15 months was not challenged and, therefore, the compensation awarded for loss of past income is just and reasonable.

Secondly, it is submitted that the fracture in

question was in the left hip of the claimant which caused the permanent partial disability and, therefore, his functioning capacity was definitely adversely affected as a businessman would be required to move from place to place all the time. It is also submitted that the Tribunal has erred in assessing the loss of future earning capacity of the claimant at only Rs.300/- per month and that if the future earning capacity of the claimant is taken into consideration, the datum figure for computing compensation for loss of future earning capacity would be much higher.

5. We have carefully heard the learned counsel for the parties and gone through the record of the claim petition. Before dealing with the rival contentions, we may note the fact that when the present appeal came to be filed, by order dated 21.9.1988, this Court had granted interim stay of execution of the award on condition that the fully awarded amount with costs and interest be deposited before the Tribunal and the claimant was permitted to withdraw only Rs.25,000/- alongwith the amount of costs and interest as directed by the Tribunal and the balance amount, after deducting the requisite court fees, was ordered to be invested in fixed deposit under cumulative interest scheme. On 3.2.2003, the claimant, respondent No. 1 herein, filed Civil Application No. 1285 of 2003 pointing out that the fixed deposit under the cumulative interest scheme had swelled to Rs.4,45,821/- and that the amount was required for the marriage of his son aged 27 years and daughter aged 23 years. The application was partly granted by order dated 25.2.2003 by which the original claimant, respondent No. 1 herein, was permitted to withdraw Rs.2,00,000/- and the remaining amount was ordered to be invested for the remaining period i.e. upto 22.6.2005.

6. The challenge in the appeal is confined to the amount of compensation under two heads. Both involve reference to the income of the original claimant. Earlier the claimant was a Bank Manager working with Oriental Bank of Commerce and was drawing a salary of Rs.2180/- and perks like free residence, conveyance allowance of Rs.225/- per month and medical allowance of Rs.50/- per month. The claimant left that job in February, 1982 and started business in synthetic cloth in the name of his wife and his mother and also started another business in the name of his sister. According to the claimant, he was withdrawing Rs.3,000/per month from the above business. In view of the said evidence, the finding of the Tribunal that the claimant's monthly

income at the time of accident was Rs.3,000/- per month cannot at all be faulted with.

7. However, the contention of the learned counsel for the appellants is that looking to the nature of injuries suffered by the claimant, it was possible for him to resume work within a few months and he could not have been bed ridden or immobilized for a long period of 15 months when all that he had suffered was a fracture on the lower end of the left femur.

On the other hand, the contention of the claimant is that whatever he had stated in the examination in chief was not challenged and, therefore, the Tribunal was justified in awarding compensation for loss of income for 15 months.

Though the statement made by the claimant that he could not resume work for 15 months does not appear to have been specifically challenged in the cross examination, it was specifically put to the claimant in cross examination that when the treatment was going on, the claimant's business was going and he was also getting his salary from the business. It cannot, therefore, be said that the claimant's case had gone unchallenged in the cross examination.

8. Now we may refer to the medical certificate dated 24.7.1987 issued by Dr Dayanidi N. Desai, Pawan Orthopedic Hospital, Surat at Exh. 61 as under:-

"I examined Mr PK Garg on 24.7.87 for assessing his PPD following a vehicular accident on 10.3.83. He has fracture shaff femur (L), k-nailing has been done. Today, he has got following findings -

(1) There are scars of operation on (L) thigh last aspect & in glutcal region. There is mild genu valgum.
(2) There is restriction of terminal 26 at (L) knee flixon.
(3) He has slight difficulty in squatting.
(4) There is new bone formation around prominal end of K-nail.

He has 7% of P.P. disability of (L) lower limb."

The claimant was also to undergo surgery with bone grafting and knee nailing.

It is also pertinent to note that although althroughout the claimant was under treatment of Dr Ajay Patel, the said doctor did not give any certificate to the claimant nor was he examined as a witness and, therefore, the claimant has not come forward with the best evidence on this aspect about the duration of his treatment and also about the fact as to whether it was or was not possible for the claimant to resume work for a period of 15 months as contended by the claimant. However, looking to the nature of the injuries and the surgery which he had to undergo, it is obvious that the claimant would have been bed ridden for a period of about six months. Even thereafter it may not have been possible for the claimant to resume work as he would continue to suffer discomfort for a few months. Even so, on a liberal estimate also, the claimant would have been able to resume work after ten months from the date of the accident and, therefore, the compensation for loss of past income could not have been for more than ten months i.e. Rs.3,000 x 10 = Rs.30,000/-. It does, therefore, appear that the Tribunal erred in granting additional compensation of Rs.15,000/- more than the compensation of Rs. 30,000/- which was required to be awarded under the head of loss of income.

9. Coming to the compensation for loss of future earning capacity, it is true that looking to the medical certificate, the permanent partial disability is to the extent of 7% of the left lower limb. It is also true that looking to the principles of Kessler, functional disability would be to the extent of half of the disability of a limb. However, this is a rule of thumb and, therefore, the percentage of functional disability may not always be half of the permanent partial disability for a particular limb of the body. Even so, the fact remains that the claimant has not produced income-tax returns for the subsequent years to show whether there was any loss of future income. Of course, the compensation is to be awarded for the loss of future earning capacity and, therefore, looking to the nature of the injuries which resulted into the permanent partial disability of the left lower limb, we are inclined to hold that the claimant had suffered loss of earning capacity to the extent of 5%.

10. At this stage, we may also note that there is some substance in the contention of Mr Marshall for the claimant that while computing the amount for loss of future earning capacity, the Tribunal had taken the datum figure on the basis of the monthly income of the claimant at the time of the accident without considering any

future projections. Considering the fact that the claimant was aged about 34 years at the time of the accident, we are of the view that the Tribunal ought to have taken the monthly income of the claimant at Rs.4,500/- per month for the purpose of computing compensation for loss of future earning capacity and on that basis, the Tribunal ought to have applied the percentage of functional disability at 5% meaning thereby Rs.225/- per month aggregating to Rs.2700/- per annum and applying the multiplier of 15, the compensation under the head of loss of future earning capacity would come to Rs.40,500/-. Accordingly, the Tribunal awarded Rs.13,500/- in excess.

It thus appears that the Tribunal awarded excess payment of Rs.15,000/- under the head of compensation for the loss of past income and Rs.13,500/- under the head of lost of future earning capacity, coming to an aggregate of Rs.28,500/-. The claimant was also awarded amounts under the other heads. It appears, however, that the Tribunal had awarded the amount of Rs.11,000/- for medical expenses as claimed by the claimant in his evidence; Rs.2,000/- for loss of scooter as claimed by him and Rs.2,000/- for the removal of nail in future. Assuming that some more amount might have been required for such last operation of removal of the nail, we are of the view that a sum of Rs.3,500/- can be awarded as additional compensation for future medical expenses.

11. In view of the above discussion, the excess amount of compensation awarded by the Tribunal works out to Rs.25,000/- and accordingly the amount of Rs.25,000/with proportionate interest thereon shall be required to be refunded to the appellants.

12. In view of the above discussion, the appeal is partly allowed.

The award dated 18.12.1987 passed by the Motor Accident Claims Tribunal (Main), Surat in MACP No. 412 of 1983 is modified to the extent that the compensation amount is reduced from Rs.1,25,000/- awarded by the Tribunal to Rs.1,00,000/-. However, the other directions regarding the payment of costs and payment of interest at the rate of 9% p.a. from the date of the application till the deposit are not disturbed. So also, the direction regarding deduction of amount of court fees which appears to have already been implemented is not disturbed.

Accordingly out of the amount of fixed deposit

taken out pursuant to this Court's order dated 21.9.1988 in Civil Application No. 640 of 1998 and modified by this Court's order dated 25.2.2003 in Civil Application No. 1285 of 2002, the amount of Rs.25,000/- with proportionate costs and interest shall be refunded to appellant No. 2-Insurance Company within one month from the date of receipt of a certified copy of this judgment or the writ of this Court. The rest of the amount shall be paid over to respondent No.1-original claimant by an account payee cheque.

(N.G. Nandi, J.)

(M.S. Shah, J.)
sundar/-